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Supreme Court, U.S.
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No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

MICHAEL B. KING,

Petitioner,

v.

DEPARTMENT OF EDUCATION, JOHN ARRINGTON, Personnel Director, WERNER ROGERS, State Superintendent of Schools, RENDEL STALVEY, Coordinator of the Health and Physical Education Consultants, MERIT SYSTEM OF PERSONNEL ADMINISTRATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the plaintiff produced sufficient evidence to raise a genuine issue of material fact as to his employment discrimination claims.

2. Whether the plaintiff's monetary claims against the individually-named defendants are barred because the plaintiff did not use the words "in his individual capacity" in the caption of the complaint.

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

The petitioner, Michael B. King, respectfully urges that this Honorable Court grant this petition for Writ of Certiorari, seeking review of the judgment of the Court of Appeals for the Eleventh Circuit, filed March 19, 1991, affirming the judgment of the District Court for the Northern District of Georgia granting the respondents' motion for summary judgment.

OPINIONS BELOW

A memorandum decision of the Eleventh Circuit, filed on March 19, 1991, affirming the district court's granting of summary judgment to the defendants appears as Appendix A. The decision of the Eleventh Circuit rejecting the plaintiff's petition for rehearing en banc, filed June 18, 1991, appears as Appendix B.

The decision of the United States District Court for the Northern District of Georgia, filed November 29, 1989, adopting the Magistrate's Report and Recommendation appears as Appendix C. The Magistrate's Report and Recommendation, filed July 26, 1989, recommending summary judgment for the defendant appears as Appendix D.

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was filed on March 19, 1991. (Appendix A.) On June 18, 1991, a decision was filed by the Eleventh Circuit rejecting the plaintiff's petition for a rehearing en banc. (Appendix B.) The period pending the petition for rehearing tolled the period

in which the petition for certiorari must be filed. Department of Banking v. Pink, 317 U.S. 264, 266 (1942). Thus, this petition is being filed timely. 28 U.S.C. §2101(c).

Jurisdiction is invoked pursuant to section 1254(1) of Title 28 of the United States Code. Because the within petition is timely filed from the decision of the Eleventh Circuit, March 19, 1991, and the decision rejecting the suggestion for rehearing en banc, June 18, 1991, this Court has jurisdiction to determine the questions raised in the prior appeal to the Eleventh Circuit arising out of the same litigation. Mercer vs. Theriot, 377 U.S. 152, 153-154 (1964).

SUPREME COURT RULES

Federal Rule of Civil Procedure 56(c) provides:

"When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must

set forth specific facts showing that there is a genuine issue for trial."

Federal Rule of Civil Procedure 10(a) provides:

"Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the name of the first party on each side with appropriate indication of other parties."

STATEMENT OF THE CASE

A. Summary of Proceedings Below

On April 20, 1987, the plaintiff filed a charge of employment discrimination in the Georgia Office of Fair Employment Practices. The plaintiff alleged that the defendants denied him the position as education consultant because he was black. On January 22, 1988, the plaintiff filed a Writ of Mandamus in Fulton County Superior Court to compel the Office of Fair Employment Practices to investigate the charge. The

Office of Fair Employment Practices issued a "no cause" letter on February 5, 1988.

On March 31, 1988, the plaintiff filed an employment discrimination complaint in the United States District Court for the Northern District of Georgia. The individually-named defendants were sued in their individual capacity. The Georgia Department of Education and the Georgia Merit System of Personnel were sued for prospective equitable relief.

On May 11, 1989, the defendants filed a motion for summary judgment. The defendants argued that the plaintiff did not present any evidence to support his employment discrimination claims. The defendants also argued that the plaintiff did not sue the individually-named defendants in their individual capacity. The defendants relied solely on the plaintiff's deposition to support their motion. The plaintiff was disposed before the defendants responded to the plaintiff's discovery requests.

The plaintiff contended that summary judgment for any of the defendants was improper because there was evidence of

employment discrimination in the case record. This evidence was contained in pleadings, answers to interrogatories, admissions and the plaintiff's affidavit. The evidence clearly showed that genuine issues of material fact existed in this case.

The plaintiff also contended that the individually-named defendants were sued in their individual capacity. In response to the plaintiff's complaint, the defendant raised the defense of qualified immunity, which is available in individual capacity lawsuits only.

The magistrate reported that the plaintiff did not produce any evidence to raise a genuine issue of material fact as to his employment discrimination claims. (Appendix D.) The magistrate also reported that the individually-named defendants were sued only in their official capacity. (Appendix D.)

The district court accepted the magistrate's report and concluded that the plaintiff did not produce any evidence to raise a genuine issue of material as to his employment discrimination claims. (Appendix C.) The district court also concluded that the

individually-named defendants were sued only in their official capacity. (Appendix C.)

On appeal, the Eleventh Circuit Court of Appeals affirmed the decision of the district court granting summary judgment to the defendants. (Appendix A.)

B. Facts Pertinent to a Determination of this Petition

On September 7, 1986, the plaintiff submitted an application for employment to the defendants Georgia Merit System of Personnel and the Georgia Department of Education. The plaintiff applied for an education consultant position. The advertised qualifications for the position were teaching experience in physical education, a degree in physical education and a valid teaching certificate in physical education. The defendant Merit System of Personnel purportedly assigned each applicant a rating score based on his/her qualifications. The maximum score that was assigned to an applicant was 100.

The plaintiff met all the requirements for the consultant position. The plaintiff had taught physical education for ten years and was an outstanding teacher. He was a tenured elementary and college instructor. The plaintiff had earned a master's degree in physical education and was certified to teach physical education in Georgia and Florida. The Georgia Division of Teacher Certification issued the plaintiff a T-5 teaching certificate. The T-5 certificate is issued to an experienced teacher who has a master's degree, and who has completed all the certification requirements (test, on-the-job performance assessments). The defendant Merit System assigned the plaintiff a rating score 94.

The defendants employed Patricia Stueck, a white applicant, as education consultant. Ms. Stueck was not minimally qualified for the consultant position. Although Ms. Stueck had a master's degree in physical education and less than five years of teaching experience, she did not have a valid teaching certificate when she was first employed with the defendants.

During the course of this litigation, the defendants produced three teaching certificates which were purportedly issued to Ms. Stueck in 1987: a NT-4 certificate, dated March 9, 1987; and two NT-5 certificates, dated April 24, 1987 and September 1, 1987. The NT-4 and NT-5 certificates are issued by the Georgia Division of Teacher Certification to new teachers who did not complete the certification test and the on-the-job performance assessment. Ms. Stueck had not completed these certification requirements when she purportedly submitted her certification application, dated February 11, 1987, to the Division of Teacher Certification.

Since Ms. Stueck had not completed the certification test and the on-the-job performance assessment, her application for a teaching certificate could not be approved without the signature of defendant Rogers appearing on her application. Defendant Rogers did not sign Ms. Stueck's certification application, nor did he authorize the Division of Teacher Certification to issue her the NT-4 and NT-5 teaching certificates. Caro Feagin, director of the

Division of Teacher Certification in 1987, fraudulently produced and issued the NT-4 and NT-5 certificates after Ms. Stueck was employed by the defendants. When the plaintiff requested the defendants to produce the certification applications for the NT-5 certificates, they admitted that Ms. Stueck did not submit any applications to the Division of Teacher Certification for the NT-5 certificates. Furthermore, the defendants admitted in Admission No. 17 that Ms. Stueck's teaching certificate number was 414-09703-001. This number does not appear on any of the certificates which were purportedly issued to Ms. Stueck.

Although Ms. Stueck did not have a valid teaching certificate and was not qualified for the consultant position, the Merit System of Personnel assigned her a rating score of 100. The plaintiff requested the defendants to produce the original job applications of those applicants who were interviewed for the consultant position. The defendants stated that they had destroyed the original applications. Under Georgia law, the defendants were required to maintain the applications in storage until this litigation

had terminated. Since Ms. Stueck did not complete a job application until after she was employed as education consultant, the defendants destroyed all the original applications to conceal this fact.

The defendants claimed that no comparison could be made between the qualifications of the plaintiff and those of Ms. Stueck because the plaintiff did not bring a copy of his resume and job application to the February 2, 1987 interview. Defendant Stalvey interviewed the plaintiff for the consultant position on February 2, 1987. Prior to February 2, 1987, defendant Stalvey did not ask the plaintiff to bring his resume and job application to the interview. The plaintiff did not receive a request from the other defendants to bring his resume and application to the February 2, 1987 interview.

Defendant Stalvey first inquired about the plaintiff's resume and job application during the interview. The plaintiff told defendant Stalvey that he would submit these documents the following day. Defendant Stalvey told the plaintiff that it was not

necessary for him to submit his resume and job application.

During the interview, the plaintiff orally provided defendant Stalvey with information about his educational background and teaching experience. This information was also in the defendants' personnel computer. Defendant Stalvey had access to the information in the personnel computer.

The defendants denied the plaintiff the consultant position because he was black. The defendants have never employed a black person as consultant in physical education. In 1987, less than five percent of the consultants employed by the defendants were black. In the same year, the defendants employed fifteen new education consultants, only one was black.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

ARGUMENT

I.

THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THIS COURT'S DECISIONS AS TO WHETHER A NONMOVANT HAS PRODUCED SUFFICIENT EVIDENCE TO RAISE A GENUINE ISSUE OF MATERIAL FACT

The Court of Appeals for the Eleventh Circuit held that the plaintiff did not present any evidence to raise a genuine issue of material fact as to his employment discrimination claims. (Appendix A.) Although the memorandum decision of the Eleventh Circuit was not published, this is a recurring issue in that it is based on the Eleventh Circuit's interpretation of what evidence is sufficient to raise a genuine issue of material fact. (See Rollins v. TechSouth, Inc., 833 F.2d 1525, 1528 (11th Cir. 1987), holding that the nonmovant, in an employment discrimination case, produced sufficient evidence to raise a genuine issue of material fact.

This Court has recently addressed this issue. In Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) and Celotex Corp v. Catrett, 477 U.S. 317 (1986), the Court held that a motion for summary judgment should not be granted if the pleadings, depositions, answers to interrogatories, admissions and affidavit show that there is a genuine issue of material fact. See F.R.C.P. 56(c).

The standard for granting a motion for summary judgment should be applied vigorously in an intentional discrimination case. Poller v. Columbia System, Inc., 368 U.S. 464 (1962). Whether the defendant's behavior reflects an intent to discriminate is a pure question of fact. Pullman-Standard v. Swint, 456 U.S. 273, 287-88 (1982). The lower courts must consider all the evidence in the light most favorable to the nonmovant. Poller, at 464. The lower courts also must believe the evidence of the nonmovant, and all justifiable inferences are to be drawn in his favor. Anderson, at 255.

The nonmovant-plaintiff will rarely produce a "smoking gun" that provides direct evidence of the defendants' intentional discrimination. Stepanischen v. Merchants Despatch Transp. Corp., 722 F.2d 922, 928 (1st Cir. 1983). But when the nonmovant points to specific facts in affidavits, answers to interrogatories, and admissions which give rise to an inference of intentional discrimination, the case must be subjected to the fact-finding process. Id.

In the present case, the plaintiff produced sufficient evidence to raise genuine issues of material fact as to his employment discrimination claims. The plaintiff produced pleadings, answers to interrogatories, admissions and an affidavit (with documents attached) to support his employment discrimination claims. This evidence showed that the advertised qualifications for the consultant position were teaching experience in physical education, a degree in physical education and a valid teaching certificate in physical education. The evidence further showed that the plaintiff was the most qualified applicant for the

consultant position and that the defendants had knowledge of the plaintiff's qualifications. The evidence also showed that Patricia Stueck, the white person who was selected for the consultant position, was not qualified for the position because she did not have a valid teaching certificate when she was first employed as education consultant. The jury could reasonably infer from this evidence that the plaintiff was denied the consultant position because he was black.

The plaintiff showed that he had ten years of successful teaching experience in physical education. The plaintiff also showed that he is an outstanding physical education teacher, and that he was a tenured elementary school teacher and college instructor. The plaintiff further showed that he had a master's degree in physical education and was certified to teach physical education in Georgia and Florida. The plaintiff's Georgia teaching certificate is a T-5. This certificate is issued to an experienced teacher who has a master's degree, and who has completed all the

certification requirements (tests, on-the-job performance assessments).

Although the plaintiff's rating score of 94 was lower than the scores of several applicants (including Ms. Stueck), he was still the most qualified applicant for the consultant position because the applicants with higher rating scores did not have valid teaching certificates. Thus, they did not meet all the requirements for the consultant position, and they should not have been considered for the position. The defendant Merit System can not justify the rating scores that were assigned to the applicants who applied for the consultant position. The defendant Merit System illegally destroyed the employment applications of each applicant to conceal the defendants' discriminatory intention.

The plaintiff showed that Patricia Stueck did not have a valid teaching certificate when she was employed as education consultant. During the course of this litigation, the defendants produced three teaching certificates which the Georgia Division of Teacher Certification purportedly issued to Ms. Stueck in 1987

(the year that she was employed as education consultant): a NT-4 certificate, dated March 9, 1987, and two NT-5 certificates dated April 24, 1987 and September 1,1987. The NT-4 and NT-5 certificates are issued to new teachers who did not complete the certification test and the on-the-job performance assessment. These teachers must have the signature of the employing superintendent on their certification application before they can be issued a valid NT-4 or NT-5 teaching certificate. Ms. Stueck had not completed the certification test and the on-the-job assessment when she purportedly submitted her certification application, dated February 11, 1987, to the Division of Certification. The application was not signed by defendant Rogers and he did not authorize anyone to sign or approve Ms. Stueck's certification application. Caro Feagin, the director of the Division of Teacher Certification, fraudulently produced and issued the NT-4 and NT-5 certificates after Ms. Stueck was employed as education consultant.

When the defendants were requested to produce the

certification applications for the NT-5 certificates, they admitted that Ms. Stueck did not apply for these certificates. The defendants also admitted in admission No. 17 that Ms. Stueck's teaching certificate number was 414-09703-001. This number does not appear on any of the certificates which were purportedly issued to Ms. Stueck. The defendants fraudulently produced several teaching certificates for Ms. Stueck to conceal their discriminatory intention.

The defendants claimed that no comparison could be made between the qualifications of the plaintiff and those of Ms. Stueck because the plaintiff did not bring a copy of his resume and job application to the February 2, 198[illegible] interview with defendant Stalvey. The plaintiff showed that this reason for denying him the consultant position was a pretext for discrimination. First, the defendants did not ask the plaintiff to bring his resume and application to the February 2, 1987 job interview. During the interview, defendant Stalvey made his first request for the plaintiff's resume and job application. The plaintiff told defendant

Stalvey that he would submit these documents the following day. Defendant Stalvey told the plaintiff that it was not necessary for him to submit his resume and job application.

Second, during the interview, the plaintiff orally provided defendant Stalvey with information about his educational background and teaching experience. Third, the information regarding the plaintiff's educational background and teaching experience was on the defendants' personnel computer. Defendant Stalvey had access to the information on the personnel computer. Defendant Stalvey knew that the plaintiff was the most qualified applicant for the consultant position.

The plaintiff was denied the consultant position because he was black. The defendants have never employed a black person as consultant in physical education. In 1987, less than five percent of the consultants employed by the defendants were black. In the same year, the defendants employed fifteen new education consultants; only one was black.

II.

THE DECISION BELOW CONFLICTS WITH A DECISION OF THE FIFTH CIRCUIT AND A DECISION OF THIS COURT AS TO WHETHER THE PLAINTIFF'S MONETARY CLAIMS AGAINST THE INDIVIDUALLY-NAMED DEFENDANTS ARE BARRED BECAUSE THE PLAINTIFF DID NOT USE THE WORDS "IN HIS INDIVIDUAL CAPACITY" IN THE CAPTION OF THE COMPLAINT

The Eleventh Circuit affirmed the district court's holding, that the individually-named defendants were "sued in their official capacity, not their individual capacity". (Appendix A).

This issue was addressed in Kentucky v. Graham, 473 U.S. 159 (1985). The Court noted that in "many cases, the complaint will not clearly specify whether officials are being sued personally, in their official capacities or both. The course of the proceedings in such cases typically will indicate the nature of the liability sought to be imposed". Id. In the present case, the plaintiff did not use the "magic" words "in his official and individual capacities" in the caption of the complaint. The individually-named defendants, however, were informed during the

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course of the litigation that they were being sued in their individual capacity.

Furthermore, the defendants raised the defense of qualified immunity in their answer to the complaint. This Court noted that "qualified immunity -- the objective 'good faith' defense -- is available only in a personal capacity lawsuit, not an official capacity action". Id. The individually-named defendants raised the qualified immunity defense because they knew that the plaintiff was suing them in their individual capacity.

The Fifth Circuit addressed this issue in Williams v. Thomas, 692 F.2d 1032, 1040 (1982). The court noted the significance of a plaintiff filing an action pro se. The Fifth Circuit held that a pro se plaintiff should not be denied monetary relief against individually-named defendants because he did not use the "magic" words "in his individual capacity". Id. at 1040. In the present case, the plaintiff filed his action pro se. The plaintiff was only required to state the name of the court, the title of the action and the file number in the caption of the complaint. See Federal

Rule of Civil Procedure 10(a). This information was provided in the caption of the plaintiff's complaint. The plaintiff should not be denied monetary relief against the individually-named defendants because he did not use the words "in his individual capacity" in the caption of the complaint.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and decision of the United States Court of Appeals for the Eleventh Circuit.

This 16th day of September, 1991.

Respectfully submitted,

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APPENDIX A.

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-8002
Non-Argument Calendar

D. C. DOCKET No. 1:88-CV-691-HTW

MICHAEL B. KING,

Plaintiff-Appellant,

versus

DEPARTMENT OF EDUCATION,
JOHN ARRINGTON, Personnel
Director, WERNER ROGERS,
State Superintendent of Schools,
RENDEL STALVEY, Coordinator of the
Health and Physical Education
Consultants, MERIT SYSTEM OF
PERSONNEL ADMINISTRATION,

Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Georgia

(March 19, 1991)

Before KRAVITCH, EDMONDSON and BIRCH, Circuit Judges.

PER CURIAM:

In this employment discrimination action, plaintiff-appellant Michael B. King contends that he was denied the position of physical education consultant with the Georgia Department of Education (Department) because he is black. The district court granted summary judgment for defendants-appellees. After reviewing the record, we affirm.

I. BACKGROUND

In response to a posting by the Department, King applied on September 9, 1986, to the Georgia Merit System of Personnel (Merit System) for the position of physical education consultant for the Department. The Merit System evaluated and assigned a score to each applicant based upon his or her education and work experience. On January 13, 1987, the Merit System listed thirty individuals eligible for the physical education consultant position and ranked them by their rating scores.

King received a Merit System rating score of 94. Eighteen persons had a higher score than King, four had the same

score, and seven had lower scores. Of those individuals scoring 94 or higher, five were black.

King and other eligible applicants were notified that they were to arrange an interview with the Coordinator of Health and Physical Education for the Department, Rendel Stalvey. Twelve candidates interviewed with Stalvey, nine of whom were white and three of whom were black, including King. Of these candidates, ten had higher Merit System scores than King and one had a lower score. Among the ten with higher scores than King, seven had a perfect score of 100, including both of the other black candidates and white applicant Patricia Stueck, who subsequently was selected for the position.

King and Stueck held masters degrees in physical education and both had full-time teaching experience, although King had more experience. [1] Each had taken courses toward a doctoral degree. Stueck had authored articles, which were published, and King had written several articles, which were unpublished.

Stalvey requested that the candidates bring their Merit System application and a resume to the interview.[2] When King appeared for his scheduled interview on February 2, 1987, he was asked to complete a three-page set of written interview questions related to the general physical education field and the specific physical education consultant position. Neither King nor any of the candidates had been notified of the written questionnaire. King did not answer the entire set of questions, although he was not given a time limit and initially wrote the answers on another sheet of paper and re-wrote his responses on the questionnaire.

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[1] King has alleged that Stueck did not possess a valid teaching certificate issued by the Department at the time of her appointment. The Department requires valid certification by the date of employment, and not the date of appointment. Stueck was certified when she became employed by the Department.

[2] Attached to Stalvey's affidavit is a letter, which forwards the "requested" resume and Merit System application for the scheduled interview of one of the three black candidates.

After King had completed the written portion of the interview, Stalvey asked him if he had brought his Merit Systems application and resume. When King responded that he had not, Stalvey discussed with King his educational and professional background, salary requirements, and travel requirements. Following the interview, King did not supply Stalvey with his resume or Merit System application. On February 9, 1987, King was informed that he had not been selected for the position of physical education consultant.

Based on her qualifications and professional work experience, Stalvey recommended Stueck for the physical education consultant position. On March 4, 1987, her nomination was approved by the Department's division director and office head. [3] King, proceeding pro se, filed a complaint against the Department with the Georgia Office of Fair Employment Practices, which determined that the Department had not discriminated against King in hiring the physical education consultant. King then filed this action in federal district court for

the Northern District of Georgia. He sought money damages, declaratory and injunctive relief and alleged violations of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000 (e), 42 U.S.C. § § 1981 and 1983, and the Thirteenth and Fourteenth Amendments to the United States Constitution.

In response to defendants' summary judgment motion, King filed a statement of genuine issues of material fact and a forty-page brief, including his affidavit and nineteen exhibits. The district court submitted defendants' summary judgment motion to a magistrate for a report and recommendation. The magistrate's thorough report and recommendation concluded that defendants' summary judgment motion should be granted. Finding no

---

[3]During discovery, defendants responded that the original deadline of February 9, 1987, for selection of the Department physical education consultant was extended to recruit more minorities.

evidence in the record of discrimination against King in the hiring of the physical education consultant, the magistrate stated:

> Plaintiff has propounded two sets of interrogatories to the Merit System, totalling 41 questions, and has filed requests to produce documents from the same. In addition, in the more than a year in which it has taken to conclude discovery, plaintiff has propounded three sets of requests for admissions, 104 individual requests, from five defendants. Plaintiff now proffers no evidence as to any discriminatory conduct on the part of the Merit System other than his own conclusory statements.

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At his deposition, King testified that he had no information that any individual at the Merit System had discriminated against him, but nevertheless steadfastly has maintained that the process of evaluating his application was discriminatory.

The district court adopted the magistrate's report and recommendation and dismissed the case. On appeal, King claims that the district court erred in concluding that the individual defendants were sued in their official capacities only, in denying motions to compel certain discovery requests, and in determining

that there was no genuine issue of material fact presented for trial. Additionally, we address the district court's failure to notice King regarding taking defendants' summary judgment motion under advisement.

II. DISCUSSION

A. Summary Judgment Notice

This circuit has required a district court to notify a pro se plaintiff ten days in advance of taking a summary judgment motion under advisement in accordance with Rule 56 (c) of the Federal Rules of Civil Procedure. Jones v. Automobile Ins. Co., 917 F.2d 1528, 1531-33 (11th Cir. 1990); Griffith v. Wainwright, 772 F.2d 822, 824-25 (11th Cir. 1985) (per curiam). Proper notice was not given in this case because King was not advised when defendants' summary judgment motion was to be taken under advisement and of his right to file affidavits or other materials in opposition to defendants' motion. Although neither party has raised this issue, we are obligated by our own precedents to

address sua sponte this omission by the district court. Griffith, 772 F.2d at 824.

Notwithstanding our bright line rule, this court has held that failure to give notice of taking a summary judgment motion under advisement is not reversible error when the parties have "'made all the arguments and submitted all the documents that they would have presented had they received the notice.'" Denis v. Liberty Mut. Ins. Co., 791 F.2d 846, 850 (11th Cir. 1986) (quoting Property Management & Investments, Inc. v. Lewis, 752 F.2d 599, 605 (11th Cir. 1985)); see Jones, 917 F.2d at 1534-35 (Recognizing the applicability of Denis and Property Management in their particular and restricted circumstances, but distinguishing those cases on the facts of Jones.); Donaldson v. Clark, 819 F.2d 1551, 1555 n.3 (11th Cir. 1987) (en banc) (The presence of "unique circumstances" creates "an extremely limited exception to the longstanding rule in this circuit that a failure to comply with the ten-day notice requirement necessitates reversal and remand").

Clearly, King was aware of the consequences of defendants' summary judgment motion without formal notice from the district court. He responded completely with a statement of genuine issues of material fact, a lengthy brief, his affidavit and exhibits, which were considered fully by the magistrate and the district court. He presented his arguments and documentation, and he has not indicated that there are any arguments or supporting affidavits and exhibits that he did not have the opportunity to submit for the court's consideration in deciding defendants' summary judgment motion. A review of his submission shows that he exhausted the resources available to him.

After more than a year of discovery in this case and with court ruling on the relevancy of requested documents that King did not receive, no purpose would be accomplished by remanding this case to the district court for technical compliance with the ten-day notification rule of our circuit. The record in this case presents a unique circumstance which demonstrates the need for an exception to this rule. We, therefore, conclude that the district court's

failure to notify King ten-days in advance of taking defendants' summary judgment motion under advisement constitutes harmless error. Accordingly, we proceed with our analysis of the appellate issues raised.

B. Official Capacity Defendants

King contends that the district court erred in concluding that the defendants were sued in their official capacities. His complaint does not state whether the individual defendants are being sued in their personal or official capacities. The caption of the case suggests that the defendants are being sued in their official capacities, although the complaint caption is not determinative. Lundgren v. McDaniel, 814 F.2d 600, 604 n.2 (11th Cir. 1987); see Brandon v. Holt, 469 U.S. 464, 469 n.11, 105 S. Ct. 873, 875 n.11, 83 L.Ed.2d 878 (1985). When a complaint does not specify in what capacity officials are being sued, "'[t]he course of proceedings' in such cases typically will indicate the nature of the liability sought to be imposed." Kentucky v. Graham, 473 U.S. 159, 167 n.14, 105 S. Ct. 3099, 3106 n.14, 87 L.Ed.2d 114

(1985) (quoting Brandon, 469 U.S. at 469, 105 S. Ct, at 877). Contrasted with personal capacity suits, official capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent.'" Kentucky, 473 U.S. at 165, 105 S. Ct. at 3105 (quoting Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 690 n.55, 98 S. Ct. 2018, 2035 n.55, 56 L.Ed.2d 611 (1978)). "[W]hile an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself." Kentucky, 473 U.S. at 166, 105 S. Ct. at 3105.

King's complaint mentions only defendant Stalvey by name. Throughout the rest of the complaint, King refers to the defendants collectively in his allegations that he was not hired as the physical education consultant for the Department because he was black. In their summary judgment motion, defendants rely solely on their official immunity defense raised in their collective

answer to the complaint. It is clear that King has sued defendants in their official capacities.

The Eleventh Amendment bars King's monetary claims against the Department and the Merit System under 42 U.S.C. § § 1981 and 1983. U.S. Const. amend. XI. The Eleventh Amendment prohibits actions against a state or its agencies without consent. Florida Dept. of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147, 101 S. Ct. 1032, 67 L.Ed.2d. 132 (1981) (per curiam); Alabama v. Pugh, 438 U.S. 781, 98 S. Ct. 3057, 57 L.Ed.2d 1114 (1978); Eldelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, 39 L.Ed.2d 662 (1974); Brown v. East Central Health Dist., 752 F.2d 615, 617 (11th Cir. 1985). The State of Georgia has not waived it immunity in the case and there is no indication that Congress intended such a waiver of immunity. See Quern v. Jordan, 440 U.S. 332, 99 S. Ct. 1139, 59 L.Ed.2d 358 (1979); Wu v. Thomas, 863 F.2d 1543 (11th Cir. 1989). Consequently, we conclude that defendants were sued in their official capacities and that King may seek only

equitable relief under the Eleventh Amendment against such state officers in their official capacities, Wu, 863 F.2d at 1550.

C. Motions to Compel

King claims that the district court erred in not compelling the defendants to produce the original employment applications submitted to the Merit System for himself, Patricia Stueck, and the two other black applicants as well as the documents used by the Merit System to evaluate the applications. He also contends that the district court erred in permitting the defendants to determine which documents in their personnel files for Stueck, Arrington and Stalvey were relevant and in not compelling production of the complete personnel files for these individuals. He argues that all of the documents were pertinent to his discrimination case.

King moved to compel production of the original applications and rating criteria for himself, Stueck and the two black applicants. Regarding the requested original applications, defendants responded by providing King with copies of the King and Stueck applications, but explained that the applications of the

two other black candidates had been destroyed. Nevertheless, the defendants stated that the information contained in the destroyed applications had already been supplied to King with other documents produced. While King's apparent complaint is that he received only copies of the requested applications instead of the original applications, he has not shown how he was prejudiced by not receiving the original applications.

Defendants argued that the requested documents used in evaluating the applications by the Merit System were confidential. The magistrate reviewed the requested documents in camera to determine whether they were relevant and whether a protective order was necessary. Following review and a hearing, the magistrate concluded that these documents were not relevant.

Additionally, King moved to compel defendants to produce the personnel files of Stueck, Arrington and Stalvey. Following a hearing, the magistrate ordered the defendants to produce Stueck's records relating to her qualifications for the position of physical education consultant and the Stalvey and Arrington

records pertaining to motives and evidence of discriminatory intent. The defendants produced various documents including the job announcement, documents regarding Stueck's qualifications including a copy of her employment application, applications for a teacher's certificate, her teaching certification, and answered numerous interrogatories. King did not file a motion to compel production of specific portions of the files. Although King contends that the district court denied his motion to compel production of the complete personnel files for these individuals, he did not identify specific documents sought, state his reasons for needing the documents, or establish how he was prejudiced by not receiving the complete personnel files.

"[A] district court enjoys broad discretion over discovery matters and will be reversed only for abuse of discretion." Harden v. Adams, 760 F.2d 1158, 1167 (11th Cir.), cert. denied, 474 U.S. 1007, 106 S. Ct. 530, 88 L.Ed.2.d 462 (1985); see Ohio-Sealy Mattress Mfg. Co v. Duncan, 749 F.2d 1560, 1561 (11th Cir. 1985) (per curiam). In this case, defendants produced

most of the documents requested by King. We are unpersuaded that his not receiving the original requested applications to the Merit System could have prejudiced King's case in any way. The magistrate held hearings regarding the motions to compel and conducted an in camera review of the requested applicant evaluation documents used by the Merit System to determine the relevancy of the documents requested. We conclude that there has been no abuse of discretion by the district court regarding King's motions to compel production of the requested documents.

D. Summary Judgment

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The movant "bears the initial responsibility of informing the district court of the basis for its motion" by identifying those portions of the record that demonstrate the absence of genuine issues of

material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). After a summary judgment motion has been filed, the nonmoving party must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex, 477 U.S. at 324, 106 S. Ct. at 2553 (quoting Fed. R. Civ. p. 56(c), (e)).

When ruling on a summary judgment motion, the Supreme Court has instructed that "the substantive law will identify which facts are material." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The Court has explained that "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson, 477 U.S. at 247-48, 106 S. Ct. at 2510 (emphasis in original). Analogous to deciding a directed verdict motion, a factual dispute

is genuine "if the evidence is such that a reasonable jury could return a verdict to the nonmoving party." Anderson, 477 U.S. at 248, 106 S. Ct. at 2510.

Appellate review of a grant of summary judgment is plenary, and we must apply the same legal standards used by the district court. Livernois v. Medical Disposables, Inc., 837 F.2d 1018, 1021-22 (11th Cir. 1988). Carlin Communication, Inc. v. Southern Bell Tel. & Tel. Co., 802 F.2d 1352, 1356 (11th Cir. 1986). We view all of the evidence and factual inferences most favorably toward the nonmoving party. Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987). We then must determine if the district court correctly has analyzed the substantive law to determine if the grant of summary judgment was proper as a matter of law. Id.

To establish a prima facie case of employment discrimination based on circumstantial evidence, a Title VII plaintiff alleging disparate treatment must prove: (1) that he is a member of a protected class; (2) that he sought and was qualified

for a job for which the employer was seeking applicants; (3) that, despite his qualifications, he was not selected by the employer; and (4) that, after his rejection, the employer continued to seek applications from persons with the plaintiff's qualifications. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L.Ed.2d 668 (1973); see Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53, 101 S. Ct. 1089, 1093, 67 L.Ed.2d 207 (1981).[4] Once a prima facie case is established, the burden shifts to the employer "'to articulate some legitimate, nondiscriminatory reason'" for the failure to hire the plaintiff. Burdine, 450 U.S. at 253, 101 S. Ct. at 1093 (quoting McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. at 1824). The plaintiff then has the opportunity to prove by a preponderance of

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[4] This court has recognized the application of the McDonnell Douglas/Burdine requirements for establishing a prima facie employment discrimination case involving hiring practices in Joshi v. Florida State Univ., 646 F.2d 981, 986 (5th Cir. Unit B 1981), cert. denied, 456 U.S. 972, 102 S. Ct. 2233, 72 L.Ed 2d 845 (1982). Rollins v. TechSouth, Inc., 833 F.2d 1525, 1532 n.14 (11th Cir. 1987).

the evidence that the justification proffered by the employer is a pretext for discrimination. Burdine, 450 U.S. at 253, 101 S. Ct. at 1093; McDonnell Douglas, 411 U.S. at 804, 93 S. Ct. at 1825. The ultimate burden of persuading that the employer intentionally discriminated against the plaintiff is on the plaintiff. Id. Because the McDonnell Douglas/Burdine order of proof and allocation of burdens applies to employment discrimination claims under the Civil Rights statutes as well as Title VII, we will consolidate our discussion of Title VII and sections 1981 and 1983. Palmer v. District Bd. of Trustees of St. Petersburg Junior College, 748 F.2d 595, 596 n.2 (11th Cir. 1984) (per curiam).

King is a member of a racial minority; he was qualified for the position that he sought because he was selected by the Merit System to interview for the job; he was rejected; and Stueck was chosen for the position. Accordingly, we find that King has established a prima facie case of employment discrimination. We now must examine defendants' reasons for selecting Stueck.

Defendants have asserted that Stueck was hired because she was better qualified for the job than King. Stueck, as well as two other black candidates, made a perfect score of 100 on the Merit System evaluation scale, while King and another black applicant received scores of 94. Although no applicant was informed of the written questionnaire that was completed at the interview, King did not respond to all of the questions, despite no time limitation having been imposed. Even though King was asked to provide copies of his resume and Merit System application in order to be considered for the position of physical education consultant, he never submitted these documents. These facts compel the conclusion that defendants have articulated nondiscriminatory reasons for selecting Stueck.

King was afforded sufficient time to conduct full discovery in this case. Yet, he has offered only unsupported, conclusory statements that defendants' rationale for hiring Stueck is a pretext for discrimination. To survive a summary judgment motion in a disparate treatment action, King is not entitled to rest on his prima

facie case when the defendants have offered nondiscriminatory evidence for the selection of Stueck. He must produce sufficient evidence to raise a genuine issue of material fact regarding the pretextual nature of the defendants' stated reasons. See Gigsby v. Reynolds Metal Co., 821 F.2d 590, 595-96 (11th Cir. 1987). "Title VII does not require an employer to hire or promote the most qualified applicant; it only requires that the employer make such decisions without regard to race, sex, religion, color, or national origin." McCarthney v. Griffin-Spalding County Bd. of Educ., 791 F.2d 1549, 1552 (11th Cir. 1986).

Based on a thorough review of the record before us, we conclude that King has not raised a genuine issue of material fact regarding defendants' intentional racial discrimination against him in the selection of Stueck for the Department's physical education consultant and that the district court's analysis of the law [in] this case is correct. Therefore, the summary judgment granted defendants-appellees by the district court is AFFIRMED.

APPENDIX B.

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-8002

MICHAEL B. KING,

Plaintiff-Appellant,

versus

DEPARTMENT OF EDUCATION, JOHN ARRINGTON, Personnel Director, WERNER ROGERS, State Superintendent of School, RENDEL STALVEY, Coordinator of the Health and Physical Education Consultants, MERIT SYSTEM OF PERSONNEL ADMINISTRATION,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion March 19, 11th Cir., 1991, ___F.2d_____).

Before: KRAVITCH, EDMONDSON and BIRCH, Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit (Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

[June 18, 1991]

APPENDIX C.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MICHAEL B. KING, Plaintiff	:	CIVIL ACTION
v.	:	FILE NO. 1:88-CV-691-HTW
GEORGIA DEPARTMENT OF EDUCATION, et al.,	:	
Defendants	:	

ORDER OF COURT

This matter is currently before the court on the Magistrate's Report and Recommendation that defendants' motion for summary judgment be granted and that this action be dismissed. Plaintiff has filed objections to the Magistrate's Report and Recommendation.

Upon review of the record in this case, including plaintiff's objections to the recommendation, the court APPROVES and ADOPTS the magistrate's recommendation as the order of this court. This matter is hereby DISMISSED.

SO ORDERED, this 28th day of November, 1989.

HORACE T. WARD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

MICHAEL B. KING

JUDGMENT IN A CIVIL CASE

v.

GEORGIA DEPARTMENT
OF EDUCATION, et al.

CASE NUMBER: 1:88-CV-691-HTW

HONORABLE HORACE T. WARD

_ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered verdict.

x **Decision by Court.** This action came for consideration before the court. The issues have been considered and a decision has been rendered. Granting defendants' motion for summary judgment and adopting the report and recommendation.

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing, that the action be dismissed, and that the defendants, GEORGIA DEPARTMENT OF EDUCATION; JOHN ARRINGTON, Personnel Director, WERNER ROGERS, State Superintendent of Schools; RENDEL STALVEY, Coordinator of Health and Physical Education Consultant; and MERIT SYSTEM OF PERSONNEL ADMINISTRATION, recover of the plaintiff, MICHAEL B. KING, costs of this action.

FILED IN THE CLERK'S OFFICE
November 29, 1989
ENTERED ON DOCKET
December 4, 1989
LUTHER D. THOMAS, Clerk

By:
Deputy Clerk

November 29, 1989 — LUTHER D. THOMAS
Date — Clerk

(By) Deputy Clerk

APPENDIX D.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MICHAEL B. KING, Plaintiff,	:	
	:	CIVIL ACTION
	:	No.1:88-cv-691-HTW
DEPARTMENT OF EDUCATION; JOHN ARRINGTON, Personnel Director; WERNER ROGERS, State Superintendent of Schools; RENDEL STALVEY, Coordinator of the Health and Physical Education Consultants; and MERIT SYSTEM OF PERSONNEL ADMINISTRATION, Defendants.	:	MAGISTRATE'S REPORT AND RECOMMENDATION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN AN EMPLOYMENT DISCRIMINATION ACTION
	:	[July 26, 1989]

Plaintiff Michael B. King has filed this action against defendants Georgia Department of Education, Georgia Merit System of Personnel, State Superintendent of Schools Werner Rogers, Department of Education Personnel Director John Arrington, and Coordinator of the Health and Physical Education Consultants Rendel Stalvey, pursuant to Title VII of the Civil

Rights Act, 42 U.S.C. § 2000 (e), 42 U.S.C §§ 1981 and 1983, 28 U.S.C. § 2201, and the Thirteenth and Fourteenth Amendments to the United States Constitution. Plaintiff alleges that the defendants discriminated against him in denying him the position of education consultant in physical education with the Georgia Department of Education because he is black.

The defendants have moved for summary judgement based upon the pleadings, statement of material facts as to which there is no genuine issue, affidavits, exhibits, and discovery materials submitted with the motion. Plaintiff, proceeding pro se, has filed a brief in opposition to defendant's motion. For the reasons that follow, the Magistrate recommends that the defendants' motion be granted.

I. FACTS

The plaintiff's action stems from the handling of his application for the position of educational consultant in physical education by the defendants Georgia Department of Education

("Department"), Georgia Merit System of Personnel ("Merit System"), and the named individuals employed by the Department.

On September 9, 1986, the plaintiff properly submitted his application to the defendant Merit System in response to a job posting by the Department. (King Affidavit, para. 2). The Merit System employs a specially trained evaluator who assigns a rating score to each applicant based upon his education and work experience. (Plaintiff's Ex. B, page 1). After the applicant has been rated, his name and score go on a "List of Eligibles" along with other applicants judged by the Merit System to be qualified for the job. Id. at 2.

On January 13, 1987, the Merit System compiled a list of persons eligible for the educational consultant position, including plaintiff, ranked in order of their Merit System rating score. (Plaintiff's Ex. P). Plaintiff was assigned a Merit System rating of 94. Id. Of the 30 persons listed, 18 persons had a higher score than the plaintiff, 4 persons had the same score, and 7 persons had lower scores. Id. Of those persons who had the

same score or a higher score, 5 were black. Id. While the hiring agency must choose from the applicants with the highest scores on the list, it does not necessarily have to hire the applicant with the highest score. (Plaintiff's Ex. B, page 2).

Plaintiff and other eligibles were notified of their eligibility and instructed to arrange an interview with the Coordinator of Health and Physical Education for the Department, defendant Rendel Stalvey. (King Deposition, page 36). Stalvey interviewed 12 candidates, 9 of whom were white and 3 of whom were black, including plaintiff. (Stavley Affidavit, page 2). Of those persons interviewed, 10 had higher Merit System scores than the plaintiff, and 1 had a lower score. (Id; see, also, Plaintiff's Appendix L, response 11). Of the 10 with the higher scores, 7 had a perfect score of 100, including both of the other black candidates and Patricia Stueck, a white candidate who was eventually selected for the position. (Id; see, also, Plaintiff's Appendix L, response 11).

Plaintiff appeared for his scheduled interview on February 2, 1987, and was asked to complete a three-page set of written

interview questions related to the physical education field, in general, and to the educational consultant position, in particular. (King Affidavit, para. 6; see, also, King Deposition, page 41). Neither the plaintiff nor any of the other candidates had been given any notice of the written test. (King Deposition, page 57). Although plaintiff did not answer the entire set of questions, he was not given a time limit within which to complete his responses and, indeed, first wrote the answers out on a scratch paper and then re-wrote the information on the questionnaire. (King Deposition, page 39). After the plaintiff completed the written portion of the interview, Stalvey asked if he had brought with him a copy of his resume and his Merit System application. (King Deposition, page 42). Plaintiff responded that he had not. Id. Plaintiff and Stalvey thereupon discussed plaintiff's educational and professional background, salary requirements, and travel requirements. (King Deposition, page 42-50). Plaintiff did not supply Stalvey with either his resume or application subsequent to the interview. (Stalvey Affidavit, page 4).

On February 25, 1987, Stalvey recommended Ms. Stueck for the position based upon her qualifications and professional work experience. (Plaintiff's Ex. J). Ms. Stueck's nomination was approved by the Department's division director and office head on March 4, 1987. (Plaintiff's Ex. J, page 2).

Plaintiff filed a complaint against the Department with the Georgia Office of Fair Employment Practices, which ultimately determined that there was no reason to believe the Department had discriminated against the plaintiff in filling the position. (King Dep., page 47). On March 31, 1988, plaintiff filed this suit seeking money damages and declaratory and injunctive relief against the defendants, alleging violations of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000(e), 42 U.S.C. §§1981 and 1983, 28 U.S.C. §2201, and the Thirteenth and Fourteenth Amendments to the U.S. Constitution.

II. DISCUSSION

Defendants have moved for summary judgement on plaintiff's claims on jurisdictional and procedural grounds, as well

as on the merits. The Magistrate will address the jurisdictional and procedural issues before moving to the merits of plaintiff's claim.

A. Plaintiff's Claims Against the Department of Education and the Merit System of Personnel Administration Under §§ 1981 and 1983

Plaintiff's monetary claims against the Department and the Merit System under 42 U.S.C. §§1981 and 1983 are barred by the Eleventh Amendment. U.S. Const., Amend. XI. The Amendment prohibits action against a state or its agencies without consent. Florida Department of Health v. Florida Nursing Home, 450 U.S. 147 (1981); Alabama v. Pugh, 438 U.S. 181 (1979); Edelman v. Jordan, 415 U.S. 651, 666-71 (1974); Brown v. East Central Health District, 752 F.2d 615 (11th Cir. 1985). There is no evidence that the State of Georgia has waived such immunity. Nor did Congress intend a waiver of such immunity. Quern v. Jordan, 440 U.S. 332 (1979) (reaffirming Edelman, 415 U.S. 651) (1974); see, also, Wu v. Thomas, 863 F.2d 1543 (11th Cir.

1989). Accordingly, plaintiff's claims for monetary relief under §§1981 and 1983 are dismissed.

Of course the Eleventh Amendment does not bar the granting of declaratory and injunctive relief. See, Scheuer v. Rhodes, 416 U.S. 232 (1984); ex parte Young, 209 U.S. 123 (1908). Nor may state defendants seek Eleventh Amendment protection in civil actions invoking Title VII. Allen v. Alabama State Board of Education, 816 F.2d 575, 577 (11th Cir. 1987).

B. Plaintiff's Claims Against Defendants Rogers, Arrington, and Stalvey

The lack of a waiver by the State of Georgia or a valid Congressional override also bars the plaintiff's damages actions under §§1981 and 1983 against the defendants Rogers, Arrington, and Stalvey in their official capacity as officers of the state. Without such waiver or consent, plaintiff may recover damages only by suing a state officer in his individual capacity. Kentucky v. Graham, 473 U.S. 159, 166 (1985); see, also, Gamble v. Florida Dept. of Health and Rehabilitative Services, 779 F.2d 1509, 1512-13 (11th Cir. 1986). The Magistrate concludes that

the plaintiff here has sued the defendants Rogers, Arrington, and Stalvey in their official capacity only and therefore may not maintain an action for damages under Sections 1981 and 1983. The Eleventh Amendment, however, does not bar claims for equitable relief against state officers in their official capacities. Wu v. Thomas, 863 F.2d at 1550 (citing Kentucky v. Graham, 473 U.S. 159 (1985).

The plaintiff's complaint does not unequivocally state whether the individual defendants are being sued in their personal or official capacity, The caption of the case strongly suggests that the defendants are being sued in their official capacity, but the caption of the complaint is not determinative on this issue. Brandon v. Holt, 464 U.S. 469 n. 11 (1985); see also, Lundgren v. McDaniel, 814 F.2d 600 (11th Cir. 1987). In cases where the complaint does not specify clearly in what capacity state officials are being sued, the course of proceedings "typically will indicate the nature of the liability sought to be imposed." Id. at 469.

The body of the plaintiff's complaint mentions only the defendant Stalvey by name. Otherwise, the complaint refers to the defendants in the collective sense. In paragraph 7 the complaint states that "defendants did not hire plaintiff." Likewise, in paragraph 8, it is alleged that "defendants have never hired a black person as a (sic) educational consultant and physical education." Again, in paragraph 9, it is averred that "[l]ess than five percent of all the educational consultants employed by the defendants were black."

Official capacity suits, in contrast to personal capacity suits, "generally represent only another way of pleading an action against an entity of which an officer is an agent." Kentucky v. Graham, 473 U.S. 159, 169 (1985). Plaintiff asserts that the denial of the position of educational consultant was part of a conspiracy to deny him and other black applicants positions within the Department. (See, e.g., King Deposition, pages 71-74). While the defendants did raise in its answer the defense of qualified immunity, which is available in personal capacity

lawsuits only, they also raised the defense of official immunity. Moreover, in their motion for summary judgement, defendants relied solely upon the official immunity defense.

The Magistrate, therefore, concludes that the state officials have been sued in their official capacity, not their individual capacity. Although plaintiff asks in his response motion to amend his complaint to include the state officials in their individual capacity as well, this is not the proper procedure for amending a complaint.

C. Plaintiff's Claims Under Title VII of the Civil Rights Act of 1964, §2000(e)

Prior to filing a suit under Title VII of the Civil Rights Act of 1964, §2000(e), plaintiff must have filed a charge with the Equal Employment Opportunity Commission or its state counterpart. Alexander v. Gardner-Denver Company, 415 U.S. 36 (1974); Culiff v. Greyhound Lines, Inc., 558 F.2d 803, 806 (5th Cir. 1977).

Plaintiff failed to name the Merit System in filing his discrimination charge with the Georgia Office of Fair Employment Practices. Defendants seek dismissal of the Title VII claim against the Merit System based upon the plaintiff's failure to satisfy the administrative conditions precedent. The plaintiff asserts that his state charge "reasonably implicated the Merit System of Personnel initial selection process as within the scope of the investigation that would reasonably be expected to grow out of plaintiff's initial charges of employment discrimination."

Review of this issue is hampered by the complete lack of documentation concerning the state proceedings in the record. The Eleventh Circuit, however, has noted that the Supreme Court has not required "that the conditions precedent to a Title VII action literally be met so long as the purposes of the preconditions have been satisfied." Jackson v. Seaboard Coastline R.R., 678 F.2d 992, 1004 n. 17 (11th Cir. 1982). "Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." Love v.

Pullman Company, 404 U.S 522, 527 (1972). The defendants' motion characterizes the state proceedings as "an investigation of the circumstances of the employment decision." As such, it is not unreasonable to assume that the accuracy of the plaintiff's Merit System rating - which along with his interview was the sole criteria used in rejecting plaintiff for the position - was investigated by the Office of Fair Employment Practices. Accordingly, the Magistrate will proceed to the merits of plaintiff's employment discrimination claim.

1. SUMMARY JUDGMENT

As stated earlier, this action is before the Court on defendant's motion for summary judgment pursuant to F.R.Civ. P. 56. Summary judgement is proper "if the pleadings, depositions, answers to interrogatories, admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law." F.R.Civ.P. 56(c). Rule 56(c) mandates entry of summary judgement, after adequate time for

discovery, against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and in which that party will bear the burden of proof at trial." Celotex Corporation v. Caterett, 477 U.S. 317, 322 (1986). The standard for granting summary judgment mirrors the directed verdict standard under Rule 50a, which requires the Court to grant a directed verdict where there can be but one reasonable conclusion. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

The movant bears the initial burden of asserting the basis of his motion. Celotex at 323. This burden is a light one; the movant is not required to negate his opponent's claims. Id. Rather, the movant may discharge his burden merely by showing "that there is an absence of evidence to support the non-moving party's case. Id. at 325. When this burden is met, the non-moving party is then required to "go beyond the pleadings" and present evidence designation "specific facts showing there is a genuine issue for trial." Id. at 324.

While all evidence and factual inferences are to be viewed in light most favorable to the non-moving party, Rollins v. TechSouth, Inc., 833 F.2d 1525, 1529 (11th Cir. 1987); Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987), the non-moving party "must do more than simply show there is some metaphysical doubt as to the material facts." Matsushita Electric Industrial Company, Ltd. v. Zenith Radio Corporation, 475 U.S. 574, 586 (1986). The non-moving party must come forward with specific facts showing there is a genuine issue for trial. Id. at 527. An issue is not genuine if it is created by evidence that is "merely colorable" or is "not significantly probative." Anderson at 249-50; Young v. General Foods Corporation, 840 F.2d 825, 828 (11th Cir. 1988). Similarly, "substantive law will identify which facts are material." Anderson at 248. Thus to survive the motion for summary judgment, the non-moving party must come forward with specific evidence of every element essential to its case so as to create a genuine issue for trial. Celotex at 323; Rawlins at 1528.

2. Employment Discrimination Claim

In a disparate treatment action, the plaintiff carries the burden of demonstrating that the defendant has unlawfully discriminated against him. Texas Department of Community Affairs v. Burdine, 450 U.S. at 248 (1981). The allocation of burdens and order of presentation and proof are as follows: (1) the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination; (2) if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, non-discriminatory reason for the action taken against the employee; and (3) should the defendant carry this burden, the plaintiff must have an opportunity to prove by a preponderance of the evidence that the legitimate reason offered by the defendant was a pretext for discrimination. McDonnell Douglas v. Green, 411 U.S. 792, 802-804 (1983).

"Although summary judgment should be granted with caution in employment discrimination cases, there are occasions where such disposition is appropriate." Hudson v. Southern

Ductile Casting Corporation, 849 F.2d 1372, 1376 (11th Cir. 1988). To survive a summary judgement motion in a disparate treatment action, plaintiff is not entitled to rest on his prima facie case when the employer offers strong evidence of a legitimate non-discriminatory reason for the adverse employment action, but must produce sufficient evidence to raise a genuine issue of fact as to the pretextual nature of the employer's stated reasons. Grigsby v. Reynolds Metal Company, 821 F.2d 590, 595 (11th Cir. 1987).

Plaintiff may establish a prima facie case of discrimination in one of at least two ways. He may present direct evidence of discriminatory intent in the form of actions or remarks of the employer, or he may rely on the analysis set forth in McDonnell Douglas and show (1) he is a member of the protected class; (2) that he is qualified and applied for the position; (3) that he was rejected despite his qualifications; and (4) a non-member of the protected class of equal or lesser qualifications was hired. Wu v. Thomas, 847 F.2d 1480, 1483 (11th Cir. 1988): Perryman v. Johnson Products Company, Inc., 693 F.2d 1138, 1142 n. 7 (11th

Cir 1983). Because plaintiff has presented no direct evidence of discrimination, he must rely on the McDonnell Douglas analysis.

The McDonnell Douglas/Burdine order of proof and allocation of burdens applies to employment discrimination claims brought under the Civil Rights statues as well as those brought under Title VII. Palmer v. District Board of Trustees of St. Petersburg Junior College, 748 F.2d 595,596 n.2 (11th Cir. 1984). Accordingly, this Court will discuss the Title VII claims and the Sections 1981 and 1983 claim together.

The defendants initially contend that summary judgment should be granted in its favor because the plaintiff cannot establish a prima facie case of discrimination. This Court disagrees. Plaintiff is black and, therefore, a member of the protected class. Defendant admits in its motion for summary judgment that plaintiff is qualified - at least to the extent that he was deemed eligible by the Merit System - for the position of educational consultant. Defendants assert that because plaintiff failed to supply them with a copy of his resume and Merit System

application, he was not "rejected" but, rather, was never considered in the final evaluation process. Such an argument, however, seems a distinction without a difference. The failure to provide defendants with a resume and the application, while relevant to the determination of whether defendants legitimately denied the position to the plaintiff, will not serve to prevent plaintiff from proving his prima facie case where defendants scheduled an interview, administered a written examination, conducted an actual interview, based on defendants' qualifications and answers to his written examination, and, accepting defendants' assertion that plaintiff was to supply them with a copy of the resume and the application, otherwise considered his application for the position. Defendants also contend that they did not seek applicants with similar qualifications but, instead, sought applicants with superior qualifications. While it appears to this Court that defendant has offered sufficient evidence to establish this final requirement, the defendant has offered sufficient evidence to overcome the presumption of discrimination, thus

making the issue of whether plaintiff actually has done so irrelevant. See, U.S. Postal Service Board of Governors v. Aikens, 469 U.S. 711, 715 (1983).

Plaintiff alleges that he was discriminated against in that he (1) was assigned an invalid Merit System score; (2) that his interview was conducted in a discriminatory manner and he was not told to provide the Department with a copy of his resume and Merit System application prior or subsequent to his interview; (3) that he was asked to take a written examination as part of the interviewing process without prior notice; and (4) that the educational consultant position was given to a white female applicant who was unqualified. Plaintiff alleges that all of these actions, as well as actions taken by the defendants with regard to other black applicants, evidence racial animus in filling the educational consultant position. The defendants assert that plaintiff was not considered for the position because he failed to provide the Department with copies of his resume and Merit System application.

With respect to the Merit System rating, plaintiff testified at his deposition that the only evidence he had that his Merit System rating was based on racial animus was that he and another black applicant received identical scores of 94 and, in his assessment, they were both more qualified than Patricia Stueck, who had received a perfect score of 100. (King Deposition, page 28). When asked why Messrs. Woods and McLean, two other black applicants, had been given perfect Merit System scores, plaintiff responded that they never should have appeared on the eligibility list because they failed to meet all of the requirements for the position and their presence on the list was mere pretext. Id. at 34. When asked what evidence he had to support his contention, plaintiff responded, "None at the Present." Id. When asked what individual of the Merit System had discriminated against him, plaintiff responded that he did not have any information at the present time but contended that the process of evaluating plaintiff's application was discriminatory. Id. at 35-36. Finally, plaintiff testified that he had discussed his case with a Ms.

Porter at the Department of Education but admitted that she had not evaluated all the applicants nor seen all of the materials relative to the educational consultant position. Id. at 29-30.

Plaintiff has propounded two sets of interrogatories to the Merit System, totalling 41 questions, and has filed requests to produce documents from the same. In addition, in the more than a year in which it has taken to conclude discovery, plaintiff has propounded three sets of requests for admissions, 104 individual requests, from the five defendants. Plaintiff now proffers no evidence as to any discriminatory conduct on the part of the Merit System other than his own conclusory statements. While plaintiff's response motion alludes to affidavits testifying as to such conduct, these affidavits have not been attached.

Plaintiff further alleges that the defendant Stalvey did not ask him to bring a copy of his resume and Merit System application to the interview or to forward them at a later date. Defendants deny this allegation, stating that Stalvey made this request to all applicants interviewed for the position. Defendants

further assert that the plaintiff's failure to supply the Department and its hiring personnel with these documents prevented full consideration of the plaintiff's qualifications.

Defendants have attached as Exhibit B to defendant Stalvey's affidavit a letter from James P. Woods, one of the three black candidates, dated January 20, 1987, forwarding the "requested" resume and Merit System notification for an interview scheduled January 28. (Stalvey Affidavit, Ex. B). Plaintiff has not come forward with any evidence that other black applicants were not asked to bring copies of these documents. Rather, plaintiff again offers only his unsupported conclusory statements and allusions to affidavits not attached to his response motion. Plaintiff's "assumption" that Ms. Stueck was being "eased" into the position because her former associate had previously held the position and his observation that Stalvey "did not conduct the interview with a great deal of confidence" are not only

unsupported but are not particularly relevant to the question of whether plaintiff was discriminated against on the basis of his race.

The heart of the dispute between the parties is whether the defendant Stalvey did indeed request that plaintiff provide his resume and application. Factual determination of this question is unnecessary because plaintiff has provided no evidence that any such failure resulted from racial animus or an intent to discriminate. The allegations in plaintiff's complaint suggest that what transpired that morning was at most a misunderstanding or mis-communication between the parties. According to the complaint, after Stalvey asked for the documents, plaintiff said he would send a copy of his resume the next day. Plaintiff quotes Stalvey as responding, "That's okay, tell me about your background." (Complaint, para. 16). The affidavit submitted by plaintiff on June 2, 1989, includes the same quote. (King Affidavit, paragraph 46). While it is not unreasonable that plaintiff could have interpreted Stalvey's response as indicating

that plaintiff need not submit his resume, it is also entirely reasonable that Stalvey was merely indicating that the mailing of plaintiff's resume after the interview would be fine. In either event, plaintiff has come forth with no evidence to support his contention that Stalvey's actions were taken with the intent to discriminate.

Plaintiff also argues that he was not given notice of a written examination and that the Department's requirement of a written examination as part of the interviewing process was discriminatory. At his deposition, plaintiff testified that he "just felt that they [the defendants] had the assumption that black folks couldn't write, and they were going to give them this written examination and use this as a pretext for not giving them a job." (King Deposition, page 54). Plaintiff also testified at his deposition that he did not have any evidence that any of the other applicants received notice that there was to be a written part to the interview, nor does plaintiff contend that white applicants did not have to complete the written examination. (King Deposition, page

57). Plaintiff, therefore has not shown any discrimination on the part of the Department or the individual defendants in administering the required written examination. Although the Department had not used the written interview process in filling the educational consultant positions prior to 1987, plaintiff proffers no evidence that the initiation of such a requirement was discriminatory.

Finally, the plaintiff has asserted that racial animus on the part of the Department is evidenced from the selection of Ms. Stueck, who plaintiff alleges is unqualified for the position. The basis of the plaintiff's argument is that Ms. Stueck wa not certified by the Department at the time of her appointment. However, the Department requires certification only by date of employment (Stalvey Affidavit, Ex. B), and the plaintiff does not dispute that Ms. Stueck was certified at that time. Ms. Stueck received a perfect Merit System rating of 100 and plaintiff has not shown any

evidence of discrimination on the part of that agency. The defendants have also offered sufficient proof of her credentials and qualifications.

Plaintiff further claims that defendants Arrington and Rogers engaged in a conspiracy to eliminate him and other black applicants from consideration by approving the nomination of Ms. Stueck even though they knew she had not been certified by the Department and, therefore, was not qualified for the position. Plaintiff's contentions regarding the Department's certification requirements fail here as well. Plaintiff offers no further evidence other than his own unsupported conclusory statements.

The Magistrate finds that the plaintiff has not carried his burden of presenting evidence of a genuine issue of material fact that the defendants' stated reason for denying the plaintiff the position, that is, the failure to provide the Department with his resume and Merit System application, was a pretext for discrimination. The Magistrate, therefore concludes that summary judgment should be granted to the defendants Merit System of

personnel, Department of Education, Werner Rogers, Rendel Stalvey, and John Arrington.

D. Equal Protection Claim

Plaintiff also asserts that the defendants have violated his Fourteenth Amendment rights to equal protection. Plaintiff does not address his equal protection claims separately in his response motion. Therefore, the Magistrate must conclude that plaintiff intends to rely on the same unsupported conclusory assertions relied upon in his employment discrimination claim. As such, his claim fails to present any evidence of a genuine issue of fact and, therefore, summary judgment must be granted to the defendant on this claim as well.

RECOMMENDATION

Accordingly, because the plaintiff has fail to present evidence that raises a genuine issue of material fact that defendant's articulated reason for denying the plaintiff the position of educational consultant was a pretext for discrimination, the Magistrate recommend that defendants' motion for summary

judgment be granted and the complaint of the plaintiff be dismissed.

AND IT IS SO RECOMMENDED this _____ day of _____, 19_____.

_____
ALLEN L. CHANCEY, JR.
UNITED STATES MAGISTRATE

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing Petition for Writ of Certiorari, by hand delivery upon:

Nancy M. Gallagher
Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334

This 31st day of ~~September~~ October, 1991.

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